BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HARRY D. SAYERS, JR. Claimant V. **PHOENIX MINING CO.** Respondent AND **NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA** Insurance Carrier	)	Docket No. 1,067,682

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 20, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery. Kala A. Spigarelli of Pittsburg, Kansas, appeared for claimant. Katie M. Black of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant suffered a personal injury by accident arising out of and in the course of his employment with respondent on June 10, 2013. The ALJ determined notice was timely, and the June 10, 2013, accident was the prevailing factor in causing a new injury to claimant's back, his medical condition and any disability. The ALJ ordered medical treatment with Dr. Hess until further order or until claimant has reached maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 1, 2015, Preliminary Hearing and the exhibits, and the August 14, 2014, independent medical evaluation (IME) performed by Harold Hess, M.D., together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to prove a compensable injury arising out of and in the course of his employment, or that the injury alleged was the prevailing factor in causing his current complaints. Respondent maintains claimant also failed to prove timely notice of his alleged injury and the ALJ's Order should be reversed.

Claimant contends the ALJ's Order should be affirmed. Claimant argues he met his burden to prove both timely notice to respondent and a compensable injury arising out of and in the course of his employment.

The issues for the Board's review are:

1. Did claimant sustain an injury arising out of and in the course of his employment?

2. Did claimant provide timely notice of an injury by accident?

FINDINGS OF FACT

Claimant was employed by respondent as coal prep plant operator, dozer operator, truck operator and equipment operator. In this position, claimant generally ran heavy equipment on a daily basis. He testified the seats in the haul trucks were broken down, and the haul road, mostly comprised of blue shale, had roughened over time. Claimant indicated he suffered repetitive jarring while driving the haul truck.

On June 10, 2013, claimant was driving a haul truck over the haul road when he hit a pot hole. Claimant indicated he sustained injury to his low back and "felt pain go down [his] right leg, and ever since then [he hasn't] been right."[1]

Claimant has a history of low back problems. In 2008, claimant suffered an accident while working for respondent. Dr. Reintjes performed an examination on January 21, 2011, and determined claimant sustained a left L5-S1 disc herniation as a result of the work-related accident. Dr. Ciccarelli performed an L5-S1 discectomy in June 2012. The claim settled on April 1, 2013. Claimant testified he "felt as if [he] was better" until he was injured again on June 10, 2013.[2]

Dr. Prostic examined claimant on January 18, 2013, regarding the 2008 work injury. In his report, Dr. Prostic noted claimant had limited improvement from his discectomy. He wrote:

> [Claimant] continues with difficulty with his back and both legs, left greater than right. [He] has pain at the base of his spine with almost constant numbness going to the lateral three toes of the left foot and intermittent to the right foot. His back pain is fairly constant at 6 on a scale of 10. His leg pains are fleeting.[3]

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[1] P.H. Trans. at 7.

[2] *Id*. at 9.

[3] *Id*., Resp. Ex. C at 1.

Claimant testified he reported the June 10, 2013, incident to his supervisor and was told to see his primary care physician, Dr. Parris. The ALJ wrote, "[c]laimant did not testify as to when he provided notice to his supervisor . . . ."[4] However, claimant twice stated he told his boss about the incident that same day.[5]

Claimant saw Dr. Fox, a physician in Dr. Parris' office, on June 17, 2013. Dr. Fox' notes indicated claimant presented with back pain, "x 9 days, twisted wrong while working on boat."[6] There is no mention of a work-related accident. Claimant agreed he felt a flare-up in his back while working on a boat. He testified:

> [M]y father and I were putting the boat together. I was standing beside the boat. My dad asked me to get him a drink and I turned around to go get him a drink and by the time I came back I could feel the tingling into my toes. I believe that was a Saturday. Two or three days later I could hardly walk, same as every flare-up I have had since the injury.[7]

Dr. Fox diagnosed claimant with low back pain and radicular pain of both lower extremities and provided an injection. He noted claimant would need an MRI if symptoms did not improve or worsened. Dr. Parris examined claimant on June 28, 2013, noting claimant's persistent, increasing low back pain with radicular aching to below the knees.[8] Dr. Parris also noted claimant's history of lumbar disc surgery, but there was no mention of a work-related incident.

Claimant testified he saw Dr. Ciccarelli in October 2013. Claimant explained Dr. Ciccarelli performed his discectomy in 2012 and agreed to an examination upon claimant's request. Claimant testified Dr. Ciccarelli provided an injection, which gave some relief, and also suggested he undergo another surgery.

Claimant returned to Dr. Prostic on September 29, 2014, at claimant's counsel's request. Claimant complained of constant pain from his right low back to right lateral foot which worsened with activity. Claimant reported a new injury to his low back after driving a large vehicle at respondent on June 10, 2013. Dr. Prostic reviewed claimant's medical records, history, and performed a physical examination. He noted claimant underwent an

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[4] ALJ Order (Aug. 20, 2015) at 2.

[5] See P.H. Trans. at 28-29.

[6] *Id*., Resp. Ex. A at 2.

[7] P.H. Trans. at 16-17.

[8] See *id*., Resp. Ex. A at 1.

MRI on July 2, 2013, which was "consistent with recurrent central herniation of disc at L5-S1."[9] He wrote:

> On or about June 10, 2013, [claimant] sustained injury to his low back with recurrent herniation of disc at L5-S1. It is suggested that he try epidural steroid injections. If these are unsuccessful, discectomy should be considered. The injury sustained June 10, 2013 and each and every workday thereafter is the prevailing factor in the injury, the medical condition, and the need for medical treatment.[10]

Dr. Hess, the court-appointed physician, examined claimant on August 14, 2015, for purposes of an IME. Dr. Hess received a history from claimant. He wrote:

> I questioned the patient regarding [Dr. Fox' note of June 17, 2013] and he reiterated that he gets periodic flare-ups of low back pain and spasms ever since 2012. He does not recall exactly when the event occurred on the boat, but he states that when he saw Dr. Fox, he assumed that this was again just another flare-up. He also states that he never had the paresthesias in the right foot associated with shooting pain down the right leg until he hit that pothole.[11]

Dr. Hess reviewed claimant's medical records and performed a physical examination, finding claimant suffered from a right S1 radiculopathy secondary to the L5-S1 central right disc herniation. He noted claimant's diagnosis was "clearly a change" from the herniation demonstrated on an MRI predating June 10, 2013.[12] Dr. Hess further wrote:

> It would be my opinion therefore, that the recurrent disc herniation occurred as his seat bottomed out on June 10, 2013. For this reason, my opinion, within a reasonable degree of medical certainty, is that the June 10, 2013 work-related injury is the prevailing factor in causing this patient's current medical condition and his current symptoms.[13]

Dr. Hess recommended claimant consider lumbar epidural injections and if his pain did not improve, a repeat lumbar MRI in preparation for a probable right L5-S1 laminectomy and discectomy.

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[9] P.H. Trans., Cl. Ex. 1 at 2.

[10] *Id*.

[11] Hess IME (Aug. 14, 2015) at 1.

[12] *Id*.

[13] *Id*. at 2.

Claimant has not worked for respondent since March 7, 2014. He currently works in the maintenance department for another employer, a position which is easier on his back. Claimant testified he continues to suffer the same symptoms in his back and right leg.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2012 Supp. 44-508(f) states, in part:

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2012 Supp. 534a(a)(2) states:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative

> law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

ANALYSIS

1. Did claimant sustain an injury arising out of and in the course of his employment?

Respondent argues that claimant's current need for medical treatment is related to a preexisting condition. While it is true claimant suffered a preexisting condition related to an October 2008 injury to the same part of the body, the medical evidence supports that

[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[15] K.S.A. 2014 Supp. 44-555c(j).

claimant suffered a recurrent herniated disc as a result of his work-related accident. In *Boucher v. Osborne Industries, Inc.*,[16] the Board wrote:

> It is possible an injury would not occur absent a worker having a preexisting condition, but the work accident could still be the prevailing factor in causing the injury. . . . The prevailing factor must be based on all relevant evidence.

Dr. Reintjes' report indicates the specific physical anomaly related to the 2008 injury was a "left L5-S1 disc herniation."[17] The current problem for which claimant is seeking treatment is, according to Dr. Hess, a right L5-S1 disc herniation. Dr. Hess believed claimant's recurrent disc herniation occurred when his seat bottomed out on June 10, 2013. Dr. Hess wrote the prevailing factor causing the right-sided herniation was the June 10, 2013, work-related accident. Dr. Prostic also believed claimant sustained a recurrent herniation of the L5-S1 disc, the prevailing factor of which was the June 10, 2013, driving incident.

The undersigned finds claimant suffered an injury by accident arising out of and in the course of his employment on June 10, 2013.

2. Did claimant provide timely notice of an injury by accident?

The medical evidence suggests claimant's current need for medical treatment is related to a specific incident occurring on June 10, 2013. Claimant testified twice that he told his boss about the incident that same day. Claimant's testimony in this regard is uncontradicted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[18]

Absent evidence to the contrary, the undersigned finds claimant provided notice of his June 10, 2013, accident on the day it occurred.

CONCLUSION

Claimant suffered an injury by accident arising out of and in the course of his employment on June 10, 2013 while working for respondent. Claimant provided notice of his June 10, 2013 accident on the day it occurred.

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[16] *Boucher v. Osborne Industries, Inc.*, No. 1,059,579, 2014 WL 3886815, (Kan. WCAB July 25, 2014).

[17] P.H. Trans., Resp. Ex. B at 2.

[18] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated August 20, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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